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No. 03-8661

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IN THE

Supreme Court of the United States

MELVIN T. SMITH,

Petitioner,

vs.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Appeals Court of Massachusetts

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a trial court grants a motion for acquittal on a charge based on an incorrect interpretation of the law, does the Double Jeopardy Clause prevent that trial court from reconsidering its decision and reinstating the charge before the case is submitted to the jury?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Double Jeopardy Clause carries the risk of substantial unfairness to society. When its ultimate sanction of immunity from criminal liability protects an acquittal or similar dismissal based on a mistake of law, the defendant gains a windfall at the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

expense of society's compelling interest in law enforcement. The present case involves an appropriate decision by the trial court to correct a legal mistake that improperly acquitted the defendant on the weapons charge. Reinstating the charge did no harm to any interest legitimately protected by the Clause, and upholding this decision will establish precedent that minimizes double jeopardy windfalls to undeserving defendants. This would preserve society's interest in prosecuting and convicting guilty criminals, which is consistent with the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Felicia Brown lived in a three-story building in Boston with her mother, stepfather, and two siblings. See *Commonwealth* v. *Smith*, 788 N. E. 2d 977, 980 (Mass. App. 2003). Brown's family occupied the third floor and most of the second floor, while renting out the rest of the building to tenants. See *ibid.* On August 15, 1996, Christopher Robinson, Brown's cousin, spent the day at the Brown home drinking and smoking crack and marijuana. See *id.*, at 980-981. At around 4:00 a.m., he went from the third floor to the second floor to lie down. As "he reached the bottom of the stairs, he saw Brown and the defendant in Brown's bedroom." *Id.*, at 981. The defendant, Melvin Smith, held what looked like a .38 caliber pistol.

Robinson testified that as he went from the third to the second floor, Smith shot him three times. *Ibid.* Brown and Smith then left the house. Robinson sought help from Brown's stepfather, who called the police. See *ibid.* "The shooting severely injured Robinson and destroyed his digestive tract." *Ibid.* Brown identified Smith as the shooter from a "photograph array" in the hospital and at trial identified him as the shooter. See *ibid.*

Smith was charged with assault with intent to murder, assault and battery with a dangerous weapon, and unlawful

possession of a firearm, fourth offense. See *id.*, at 980. The firearm charge was under a Massachusetts law that makes knowing possession of a "firearm" illegal unless otherwise exempted. See Mass. Gen. Laws Ann., ch. 269, § 10(a) (West 2000). The relevant Massachusetts law defines "firearm" as "a pistol or revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and which the length of the barrel or barrels is less than 16 inches . . . ." Mass. Gen. Laws Ann., ch. 140, § 121 (West 2002). After the prosecution rested, the defense "moved for a required finding of not guilty on the charge of unlawful possession of a firearm, arguing that because the Commonwealth had not introduced direct evidence of the gun's length, the Commonwealth had not proved that the gun met the statutory definition of a firearm." *Smith*, 788 N. E. 2d, at 981. The judge granted the motion. While this was not told to the jury, it was entered on the docket. See *ibid.*

Later the same day, after the defense rested, but before closing argument, the prosecution brought to the trial court's attention a Massachusetts Supreme Judicial Court opinion holding "that testimony that a gun was a pistol or revolver was enough to permit a firearm charge to the jury." *Ibid.* Since the prosecution had submitted evidence conforming to this standard, the trial court then corrected its mistake and reinstated the firearm charge. See *id.*, at 981-982. "The docket reflects that the motion for required finding of not guilty had been reconsidered and denied." *Ibid.* The prosecution did not offer any additional evidence after the acquittal motion was denied, and the intermediate appellate court stated that "the defendant was provided the opportunity to reopen his case." *Id.*, at 983. The defendant was convicted on all charges. See *id.*, at 980.

The intermediate appellate court upheld the firearm conviction against the defendant's double jeopardy attack. See *id.*, at 982. It held that since the trial court's ruling did not require a second proceeding, double jeopardy was not violated. See *ibid.* The appellate court also held that the trial court had

the authority under Massachusetts law to reconsider its ruling on the defendant's motion, and that the defendant was not prejudiced by reinstating the firearm charge. See *id.*, at 982-983. The appellate court affirmed all the convictions. See *id.*, at 989.

The Massachusetts Supreme Judicial Court denied further appellate review. See *Commonwealth* v. *Smith*, 797 N. E. 2d 380 (2003) (table). This Court granted certiorari on June 14, 2004.

SUMMARY OF ARGUMENT

Although the Double Jeopardy Clause has ancient roots, the realities of modern procedure have extended its reach far beyond its common law origins. This has led to a still developing body of law that can produce anomalous results. A particularly great problem with modern applications of the Clause is the potentially unfair granting of windfalls to undeserving defendants.

The Double Jeopardy Clause is the ultimate weapon in constitutional criminal procedure, as a successful claim immunizes the defendant from criminal liability. While there are many instances where this ultimate sanction is fair, it is unfair to the prosecution to free the defendant without any possibility of retrial due to the mistake of a third party such as the trial court. The Clause should be applied in a way to minimize these windfalls.

Windfalls can be reduced by limiting the Clause to cases where the interests it protects are clearly threatened. An interest-based approach is consistent with this Court's applications of the Clause and other areas of constitutional criminal procedure such as the Fourth Amendment and the right to effective assistance of counsel. Balancing societal and defendant interests also explains the significance of acquittals in double jeopardy jurisprudence. Limiting the Clause's protection to acquittals minimizes its costs to society while retaining most of its protection. A similar calculus should also be used in determining whether an action is an acquittal that is worthy of the Clause's protection.

The trial court's decision to reinstate the weapons charge did not threaten any of the defendant's double jeopardy interests in this case. Since this action occurred midtrial, and before the jury began deliberations, the defendant was not threatened with being worn down by the State's superior resources. The fact that trial counsel never asked to reopen the defense demonstrates that the defense to the weapons charge was not prejudiced by the ruling.

Nor did reinstating the weapons charge threaten the defendant's interests in finality. While double jeopardy protects acquittals, an acquittal does not warrant the Clause's protection until it is final. For example, this Court can reverse an appellate court's holding that there was insufficient evidence to convict, and a verdict of acquittal can be overturned by a jury poll. Similarly, an appellate court can use its power to rehear its own decisions to reverse an initial determination of insufficient evidence to convict. Since the trial court had the authority to reconsider its dismissal of the weapons charge under Massachusetts law, the reinstatement of the weapons charge was a simple exercise of a valid judicial power. Therefore, the initial dismissal was not final and did not warrant double jeopardy protection.

ARGUMENT

I. In its current form, the Double Jeopardy Clause can create windfalls for the defendant at the expense of society's compelling interest in punishing the clearly guilty.

This Court's interpretation of the Double Jeopardy Clause illustrates the problems with applying its common law princi-

ples to a very different modern setting. The Clause has ancient roots, but it now regulates a very different criminal justice system. Fitting this old guarantee to modern procedure can pose substantial problems to society and the justice system.

The common law development of double jeopardy began sometime in the thirteenth century. By the seventeenth century, it had evolved "into four common law pleas: autrefois acquit (former acquittal), autrefois convict (former conviction), autrefois attaint (former attainder), and pardon." See Office of Legal Policy, Report to the Attorney General on Double Jeopardy and Government Appeals of Acquittals (1987), reprinted in 22 U. Mich. J. L. Ref. 831, 843-844 (1989). The common law pleas were described in some detail by Blackstone. See 4 W. Blackstone, Commentaries 329-332 (1st ed. 1769). The Double Jeopardy Clause "tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*," *United States* v. *Wilson*, 420 U. S. 332, 341-342 (1975), rooting the Clause in the common law pleas. See *United States* v. *Scott*, 437 U. S. 82, 87 (1978).

The purpose of the Clause is derived from its history.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S. 184, 187-188 (1957); accord *Scott*, 437 U. S., at 87.

The history and purpose of the Clause have only limited use in its modern application. "These historical purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common law pleas . . . ."

Scott, 437 U. S., at 87. The problem is that modern criminal procedure is radically different from criminal procedure at the common law or the founding. For example, the present case turns on the meaning of the trial court's response to the defendant's motion for a directed verdict at the close of the prosecution's evidence, a procedure that did not exist at either the common law or the founding. Directed verdicts first appeared in criminal cases in this country in the Civil War and Reconstruction era. See Phillips, The Motion for Acquittal: A Neglected Safeguard, 70 Yale L. J. 1151, 1152, n. 8 (1961); Sauber & Waldman, Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 439 (1994). It was not codified by Congress until the Criminal Appeals Act of March 2, 1907. See Sauber & Waldman, *supra*, at 440. Much of this Court's precedent on acquittals and double jeopardy concerns the prosecution's right to appeal when the case ends in something other than a judgment of guilt. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986). The right to appeal is also a relative latecomer to criminal procedure. The defendant had no right to appeal in criminal cases until the late nineteenth century, and the United States did not have a real right to appeal until 1971. See Sauber & Waldman, *supra*, at 441. The lack of government appeals stunted this Court's analysis of acquittals and their effects. See *Scott*, 437 U. S., at 89. This aspect of double jeopardy law did not begin to develop until Congress gave the United States full appellate rights in criminal cases in 1971 and the Double Jeopardy Clause was applied to the states in *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969). This leaves a body of law not as well developed as that found in other constitutional rights.

Fitting this ancient right to modern criminal procedure is not always easy. The Double Jeopardy Clause is the ultimate weapon of the criminal defendant. While a successful appeal under other constitutional provisions such as the self-incrimination privilege, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966),

or the right to effective counsel, see *Strickland* v. *Washington*, 466 U. S. 668 (1984), may vacate the conviction, retrial is still allowed. The double jeopardy claim is one of the very few constitutional claims that, if successful, precludes retrial and ends any possibility of criminal liability.[2] This is a "drastic sanction" that is "rarely seen in criminal law, even for constitutional violations." *Reed* v. *Farley*, 512 U. S. 339, 368 (1994) (Blackmun, J., dissenting). This creates a fertile ground for injustice if improperly applied.

A fundamental principle of double jeopardy law is that an acquittal ends the prosecution, no matter how erroneous. Even if an acquittal is "based upon an egregiously erroneous foundation," the prosecution is over, with no chance of correction through appeal or retrial. See *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) (*per curiam*); *Arizona* v. *Rumsey*, 467 U. S. 203, 211 (1984); *Sanabria* v. *United States*, 437 U. S. 54, 77-78 (1978). Similarly, double jeopardy jurisprudence gives "absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision . . . ." *Burks* v. *United States*, 437 U. S. 1, 16 (1978) (emphasis in original).

It can be unfair to society to lose forever the opportunity to convict and punish a wrongdoer because of a mistake that is not the prosecution's fault. Society has a compelling interest in catching, convicting, and punishing criminals. It is " '[t]he most basic function of any government' [ ] 'to provide for the security of the individual and of his property.' " *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983) (quoting *Miranda*, *supra*, at 539 (White, J., dissenting)). Trying and convicting criminals is essential to this compelling interest. "Corresponding to the right of the accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such

2. Other claims which preclude reprosecution are those involving the Sixth Amendment right to a speedy trial, see *Strunk* v. *United States*, 412 U. S. 434, 439-440 (1973), or successful Ex Post Facto or statute of limitation claims.

a trial." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). The Double Jeopardy Clause's bar to retrial frustrates society's right to protect itself and obtain an accurate determination of the defendant's guilt. While "the Constitution conclusively presumes" that placing the defendant twice in jeopardy is unfair, see *Arizona* v. *Washington*, 434 U. S. 497, 503 (1978), it is no less true that the Clause can create results that are unfair to the state and unjust to society.

In most circumstances, applying the Double Jeopardy Clause to bar retrial causes no injustice. In a trial free of erroneous and prejudicial rulings against the prosecution, society's interest in reviewing an acquittal is outweighed by the interests protected by the Clause. Similarly, when the prosecution's actions are intended to provoke a mistrial in order to harass the defendant through multiple prosecutions, see *United States* v. *Dinitz*, 424 U. S. 600, 611 (1976), any legitimate interest in retrial is forfeited by the prosecution's bad faith.

Double jeopardy creates a windfall for the defendant when the acquittal comes from a mistake by the trial court. When the prosecution's case is compromised by the improper exclusion of evidence during the trial, or an erroneous definition of the offense leads to an incorrect directed verdict, the people are deprived of their day in court. Since double jeopardy precludes review of acquittals, see *Martin Linen*, 430 U. S., at 571, there is no chance to correct the error. Although this result may be compelled by the Double Jeopardy Clause, it is still unfair to the public interest.

In other areas of constitutional law, errors not attributable to the police or the prosecution will not justify overturning the conviction. For example, the Fourth Amendment exclusionary rule does not apply when officers rely in good faith on the magistrate's mistaken issuance of a search warrant. See *United States* v. *Leon*, 468 U. S. 897, 921 (1984). It is also true that the prosecution is penalized for the mistakes of others in ineffective assistance of counsel cases, see *Strickland*, 466 U. S., at 686, but even there the prosecution still retains the

opportunity to retry the defendant. Only double jeopardy can end a prosecution due to the mistake of the trial court.

Although a trial court's mistake cannot by itself change the result under the Double Jeopardy Clause, the extraordinary cost of a successful invocation of the Clause should inform this Court's analysis. Fortunately, double jeopardy jurisprudence is not formulaic, and there is a way to minimize the Clause's cost while retaining its essential protection.

II. The Double Jeopardy Clause should only apply when the interests it protects are clearly threatened.

The Double Jeopardy Clause is not absolute. There are times when "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interests in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). Since the Clause now extends to situations not covered by its common law origins, see *supra*, at 7, it should be applied more flexibly. This Court's decisions demonstrate that the Clause's modern application can accommodate other needs.

United States v. *Scott*, 437 U. S. 82 (1978) demonstrates this principle. At the close of evidence, the trial court granted the defendant's motion to dismiss two counts of the indictment due to prejudicial preindictment delay. See *id.*, at 84. The government's appeal was dismissed by the Court of Appeals on double jeopardy grounds. *Ibid.* This Court held that Double Jeopardy did not bar the government's appeal. See *id.*, at 101.

While the principles of double jeopardy counsel that the state should not be allowed to use its superior resources to grind down the defendant through repeated retrial, see *id.*, at 95, this did not extend to situations where the defendant is responsible for the termination of the charges. In that case, it "is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at

least insisted on having the issue of guilt submitted to the first trier of fact." *Ibid.* Instead, the defendant chose "to avoid conviction and imprisonment" by advancing "a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *Ibid.*

Given the extreme consequences of a successful double jeopardy defense, it must be clear that the case ended in an acquittal before applying the Clause's absolute protection. If the Double Jeopardy Clause was applied to Scott's case, then "only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Id.*, at 100 (quoting *Arizona* v. *Washington*, 434 U. S. 497, 509 (1978)). Since no interest protected by the Double Jeopardy Clause was compromised by the appeal, see *ibid.*, double jeopardy does not bar the government's appeal "where the defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence . . . ." *Id.*, at 101.

Scott partially overruled *United States* v. *Jenkins*, 420 U. S. 358 (1975). See 437 U. S., at 101. *Jenkins* involved a bench trial in which the trial court " 'dismissed' the indictment and 'discharged' the respondent" at the conclusion of the trial. See 420 U. S., at 359. The defendant had been indicted for " 'knowingly refusing and failing to submit to induction into the armed forces of the United States.' " *Ibid.* He moved for acquittal based on *United States* v. *Gearey*, 368 F. 2d 144 (CA2 1966), which held that an induction order was invalid if the draft board did not postpone the order until it resolved the registrant's conscientious objector claim. See 420 U. S., at 361. *Gearey* also held that the local board must reopen the registrant's classification if "the registrant's conscientious objector views had ripened only after he had been notified to report for induction." *Id.*, at 361-362. *Gearey* was the law of the circuit when Jenkins was ordered to report, but was overturned two months later in *Ehlert* v. *United States*, 402 U. S. 99 (1971).

See 420 U. S., at 362. The District Court held that *Gearey* applied to Jenkins' case, since applying *Ehlert* would be unfair. See *ibid.* In *Jenkins*, this Court addressed whether the government could appeal the District Court's decision. See *id.*, at 360.

In the context of jury trials, differentiating between the verdict and the court's rulings of law is easy. *Id.*, at 366. However, in bench trials, these decisions are potentially much harder to separate. See *id.*, at 367. It was unclear in *Jenkins* whether the District Court's ruling resolved any or all issues of fact in the defendant's favor. See *ibid.* In this situation, a successful government appeal would not reinstate a finding of guilt since "there was no such finding, in form or substance, to reinstate." *Id.*, at 368. The rule "that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be reinstatement of a jury's verdict of guilty or a judge's finding of guilt" did not apply in *Jenkins* "because of the uncertainty as to the basis of the District Court's actions here . . . ." *Ibid.* Since there was no other valid reason for allowing the appeal, it was barred by double jeopardy. See *id.*, at 370.

Scott overruled *Jenkins* to the extent that it prevented the government from appealing a midtrial dismissal that was sought by the defendant and was unrelated to guilt or innocence. See 437 U. S., at 101. While this does not specifically reject *Jenkins*' approach to cases where the existence of an acquittal is unclear, *Scott* also disapproved of *Jenkins*' general approach to the Double Jeopardy Clause. It found that the general principle of double jeopardy cited in *Jenkins*, "is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *Id.*, at 95-96. Similarly, "we believed we pressed too far in *Jenkins* the concept of the 'defendant's valued right to have his trial completed by a particular tribunal.' " *Id.*, at 100-101 (quoting *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949)). *Jenkins* had to be set aside because it expanded double jeopardy too far. The

Clause should apply only where its interests are clearly threatened, which was not the case in *Scott*.

This Court's other double jeopardy cases reflect similar caution, invoking the Clause where the threat to the defendant's interests is clear, but not applying it where there is no such threat. In *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977), the jury was discharged after seven days of deadlock, and six days later a timely motion for acquittal was filed. See *id.*, at 566. Two months after that, the motion was granted. See *ibid.* The question was whether double jeopardy prevented an appeal of these orders, to which this Court answered "yes." See *id.*, at 567. *Martin Linen* addressed the "heart of [double jeopardy] policy . . . the concern that permitting the sovereign freely to subject the citizen to a second trial to a same offense would arm the Government with a potent instrument of oppression." *Id.*, at 569.

In order for double jeopardy to apply, the defendant had to meet two threshold conditions. First, the defendant must have been placed in jeopardy, and second, the government appeal must threaten successive prosecutions. See *id.*, at 569-570. Since there would be new proceedings if the government's appeal succeeded, see *id.*, at 570, it was necessary to "inquire further into the constitutional significance of a Rule 29(c) acquittal." *Id.*, at 571.

The constitutional effect of the District Court's actions was clear. It was an acquittal in both form and substance. *Id.*, at 571-572. The existence of an acquittal turns on whether the court's action "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.*, at 571. Here "it is plain" that the trial court considered the evidence and determined that "it was legally insufficient to sustain a conviction." *Id.*, at 572. Therefore double jeopardy barred the appeal.

The United States argued that only an acquittal verdict by a jury warranted double jeopardy protection. See *ibid.* Since

directed verdicts of acquittal were given double jeopardy protection, see *Fong Foo* v. *United States*, 369 U. S. 141, 142-143 (1962) (*per curiam*), this argument was inherently untenable. The government attempted to distinguish *Fong Foo* by noting that in that case the jury was directed to submit an acquittal. See *Martin Linen*, 430 U. S., at 573. Formalities like this did not govern the Clause. What mattered was the effect of the order on the interests protected by the Double Jeopardy Clause. It was an acquittal which must be protected under double jeopardy. Something as trivial as the timing of this final order, see *ibid.*, was irrelevant. If the government's appeal succeeded, the defendants would be tried again even though the trial court had held that the government had failed to carry its burden of proof and entered a final order dismissing the case. If this order could not be respected under double jeopardy, then there would be no reason to accord any respect to acquittals in bench trials or directed verdicts of acquittals. Since judges have the same power to acquit as juries, see *United States* v. *Sisson*, 399 U. S. 267, 290 (1970), barring the government's appeal was inevitable in *Martin Linen*.

Smalis v. *Pennsylvania*, 476 U. S. 140 (1986) involved a similarly clear threat to the interests preserved by double jeopardy. At the close of the prosecution's case, the trial court "dismissed certain charges against petitioners on the ground that the evidence presented was legally insufficient to support a conviction." *Id.*, at 141. The case was a bench trial, and the trial court dismissed those charges on the defendants' demurrer. See *id.*, at 141-142. The Pennsylvania Supreme Court held that this order was reviewable on appeal since a demurrer is a legal ruling rather than a finding of fact. See *id.*, at 142-143. Once again, the case for applying double jeopardy was clear. A ruling that as a matter of law the evidence is insufficient to support a conviction was long considered an acquittal. See *id.*, at 144. A successful appeal by the government would subject the defendant to post-acquittal factfinding. Since this would frustrate the defendant's interest "in having an end to the

proceedings against him," *id.*, at 145, double jeopardy precluded the appeal of the demurrer. See *id.*, at 145-146.

Other findings of double jeopardy violations by this Court are also based on clear threats to the basic interests protected by the Clause. *Sanabria* v. *United States*, 437 U. S. 54 (1978) held that a government appeal from a midtrial exclusion of evidence and subsequent acquittal was barred by double jeopardy. See *id.*, at 56, 62. Although the exclusionary ruling was erroneous and led to the acquittal, allowing an appeal of this ruling would compromise double jeopardy principles. See *id.*, at 78. The government conceded this basic point, only disputing whether it could retry the defendant on a different theory of liability. See *id.*, at 64-65. In essence, the government argued that dismissing one theory of liability was "as if the Government charged the crime in two counts and the District Court had dismissed [one] count." *Id.*, at 65. The fatal problem with this argument is that the government did not charge two separate counts on two separate theories of liability. Only one count was charged in the indictment, and it was terminated by the District Court's acquittal. See *id.*, at 66-67. Subjecting the defendant to a new trial for the same offense, but on a different theory of liability unacceptably gives a second bite at the apple to the prosecution, thus undercutting the adversarial system. See *id.*, at 78.

The fact that double jeopardy does not apply where these basic interests are not threatened is further demonstrated in *Lee* v. *United States*, 432 U. S. 23 (1977). The defendant was charged with stealing two billfolds from a post office concessionaire. See *id.*, at 24-25. The relevant statute "require[d] proof that the theft be committed knowingly and with intent to deprive the victim of his property." *Id.*, at 25. The information did not contain any allegation of knowledge or intent, which the defendant pointed out to the trial court in a motion to dismiss the information. This motion was made after the prosecutor's opening statement. See *ibid.* The District Court tentatively denied the motion, and the defendant did not object to going

forward with the trial, so long as the District Court continued to study the motion to dismiss. See *id.*, at 26. At the end of the Government's case, the defendant moved for acquittal. See *ibid.* The defendant then rested without presenting any evidence and the District Court considered the two motions. It dismissed the acquittal motion, finding that the Government had proven specific intent, but granted the motion to dismiss because of the failure to charge knowledge or intent in the information. *Id.*, at 26-27. Lee was indicted and retried, *id.*, at 27, and this Court held that double jeopardy did not bar a second trial. *Id.*, at 34.

The defendant claimed that he never should have been tried in the first place, and that once tried he had a right to a final determination of guilt or innocence by the jury. See *id.*, at 27. This was untenable. As the Government pointed out, the defendant invited this situation by filing the motion at the last minute and allowing jeopardy to attach before a final ruling. See *id.*, at 28. In this situation, the interests protected by the Double Jeopardy Clause did not bar retrial. See *id.*, at 33-34.

A "bedrock" of the Double Jeopardy Clause is the defendant's interest in finality. See *Hudson* v. *United States*, 522 U. S. 93, 111 (1997) (Stevens, J., concurring in the judgment). The proceedings against the defendant must end at some point in order to prevent the government from prevailing due to attrition rather than proof. See *Green* v. *United States*, 355 U. S. 184, 187-188 (1957). This protection is necessary in order to prevent the Government from convicting the defendant through the brute force of its vastly superior resources. See *ibid.* Yet even this "bedrock" principle has its limits. As noted in this brief, there are many instances in which the government can retry the defendant even though jeopardy had already attached. Successful defense appeals unrelated to proof of guilt, dismissal of indictments or information, and most mistrials are a few examples. In theory, the Government has the right to retry the defendant an unlimited number of times so long as the reason for terminating the trial is not an acquittal or

its functional equivalent.[3] A defendant in this situation could be worn down by retrial just as effectively as if the Government could retry acquittals.

This Court's precedents draw a line between prosecutions ending in acquittals and those ending for other reasons, giving acquittals a "particular significance . . . ." *Scott*, 437 U. S., at 91. While the effect of a retrial on the defendant is the same in both cases, only acquittals are considered final under double jeopardy. In part, this reflects the Clause's roots in the common law plea of prior acquittal. This can only be a partial explanation, however, because criminal procedure and the scope of double jeopardy's protection have greatly expanded beyond the Clause's roots. Cf. *id.*, at 87 (noting the expansion of criminal procedure since the common law and a modern double jeopardy jurisprudence removed from the common law pleas). Nor is it enough to say that by achieving a verdict of acquittal, the defendant has "won" the case. Guilty verdicts do not end the case as they are subject to appeal by the defendant, and the government may appeal adverse final orders that are not equivalent to acquittals. See *Scott*, *supra*, at 101. Acquittals are the only final orders that cannot be appealed by the losing party.

The distinction between acquittals and orders which end the trial but allow retrial is based on necessity. Preventing retrial whenever the defendant prevails is simply too expensive to justice and society. The people have a right to their day in court and an opportunity to convict the defendant. See *id.*, at 100. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings

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3. If a mistrial is declared due to an error "motivated by bad faith or undertaken to harass or prejudice," then retrial is barred by double jeopardy. See *United States* v. *Dinitz*, 424 U. S. 600, 611 (1976). Therefore a prosecutor could not provoke a mistrial through error intended to wear down the defendant through repeated retrial.

leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964).

Limiting double jeopardy to acquittals pays respect to the Clause's common law roots, and maximizes its utility to society. Since a primary purpose of the Clause is protecting the innocent, it makes sense to limit its protections to those most likely to be innocent, the acquitted. By concentrating its powerful benefits on the most deserving, double jeopardy's costs are reduced while maintaining most of its benefits.

This approach should also be applied to the definition of acquittal. While this Court's cases show that in most cases it is relatively simple to determine whether there is an acquittal, see *supra*, at 10-18, more difficult cases do happen. In those cases, double jeopardy should not apply unless the case for its application is clear. If it is unclear whether the interests protected by double jeopardy are threatened by the action in question, then the Clause's extraordinary sanction should not apply.

It is entirely proper to consider the costs of applying a constitutional provision as a factor in determining the relevant standard. Cost-benefit analysis is most explicit in Fourth Amendment decisions determining the reasonableness of a search or seizure. See *Hiibel* v. *Sixth Judicial District Court*, 542 U. S. __, 159 L. Ed. 2d 292, 304, 124 S. Ct. 2451, 2459 (2004). Similarly, the extraordinary remedy of the exclusionary rule is not applied when its costs exceed its benefits. See *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363 (1998). Practical considerations also inform the test for determining ineffective assistance of counsel. An important consideration in the creation of this standard was to prevent an excessively intensive inquiry into defense counsel's conduct from harming counsel's performance or willingness to represent criminal defendants. See *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984). Therefore, the *Strickland* standard was "highly deferential" to defense counsel's conduct of the defense. See *id.*, at 689.

While the Constitution does not bend and sway with every societal need, practical considerations are relevant to constitutional standards. An important consideration in administering constitutional criminal procedure is keeping criminal defendants from benefitting from undeserved windfalls. See, *e.g.*, *United States* v. *Salvucci*, 448 U. S. 83, 95 (1980); *Mickens* v. *Taylor*, 535 U. S. 162, 173 (2002); *Lockhqrt* v. *Fretwell*, 506 U. S. 364, 366 (1993). Applying double jeopardy's absolute prohibition against retrial in cases where its need is not clear is a windfall to the lucky defendants. Limiting double jeopardy to cases where it is unquestionably necessary appropriately keeps defendants from getting windfalls while retaining the essential benefits of the Clause.

III. There is no threat to the interests protected by the Double Jeopardy Clause that justifies invoking the Clause in this case.

The trial court's action did not threaten any of the defendant's double jeopardy interests in this case. The trial court's first ruling mistakenly concluded that the People, as a matter of law, had not proven the firearms offense. It then corrected this mistake before the case was submitted to the jury. See *supra*, at 3. While the defendant was briefly "freed" from the weapons charge, the trial court's mistake and decision to correct it did not influence the jury or adversely affect the defense. There is no reason to believe that the defendant was in any way prejudiced by the trial court's actions.

The primary interests protected by the Clause are set forth in the famous passage from *Green* v. *United States*, 355 U. S. 184, 187-188 (1957), quoted *supra*, at 6. Upholding the trial court's action in this case will not give the government a tool "to make repeated attempts to convict an individual for an alleged offense . . . ." *Id.*, at 187. Most importantly, the trial court's decision did not give the prosecution another bite at the apple. While the prosecution was able to convince the trial

court that its legal ruling was incorrect, the trial court's action did not allow the government to reprove its case. A procedure is less likely to violate double jeopardy if it does not require additional factfinding. For example, if a government appeal does not threaten a successive prosecution, then it is not barred by double jeopardy. See *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569-570 (1977). As this Court noted in the context of the Government's right to appeal, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Wilson*, 420 U. S. 332, 344 (1975) (footnote omitted).

In *Wilson*, the District Court dismissed the indictment for prejudicial delay after the jury returned a guilty verdict. See *id.*, at 333. Double jeopardy did not bar an appeal of this ruling. See *ibid.*

> "Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing exposure and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.*, at 345 (footnote omitted).

Similarly, the trial court's decision in this case did not require a new jury to be empaneled or new proof to be heard. While the defendant was now exposed to liability on the gun charge, his defense to that claim was not prejudiced. "This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact." *United States* v. *Scott*, 437 U. S. 82, 96 (1978).

It is possible that an action terminating the prosecution may be protected under double jeopardy even when reversing the action would not require new factfinding. In *Martin Linen*, this Court was adamant that the timing of an order was irrelevant to whether double jeopardy made the order unreviewable. See

430 U. S., at 573-575. It could be argued that this principle and the "particular significance" that the law attaches to acquittals, see *Scott*, 437 U. S., at 91, could render a judicially ordered acquittal issued after a guilty verdict immune to review. This hypothetical does not change the analysis here, and the question need not be resolved to decide this case.

The hypothetical above addresses finality, the other main interest protected by double jeopardy. A "primary purpose" of the Double Jeopardy Clause is to "preserve the finality of judgments." *Crist* v. *Bretz*, 437 U. S. 28, 33 (1978). In the hypothetical, the judge's order would be considered final and it could be argued that the defendant should be allowed to rely on it. Therefore, double jeopardy would protect the integrity of a judgment of acquittal that is meant to be final.

The present case does not raise such finality issues. In order for an action to be deemed an acquittal under double jeopardy, it first must be final. This can be an acquittal order entered after a hung jury is discharged, see *Martin Linen*, 430 U. S., at 565-566, an order directing a verdict of acquittal at the conclusion of the prosecution's case, see *Fong Foo* v. *United States*, 369 U. S. 141, 142-143 (1962) (*per curiam*), or dismissing some charges as unsupported by the evidence at the end of the prosecution's case and holding the other charges in abeyance pending appeal of the demurrer. See *Smalis* v. *Pennsylvania*, 476 U. S. 140, 141-142 (1986); see also *Commonwealth* v. *Smalis*, 480 A. 2d 1046, 1048, n. 1 (Pa. Super. 1984). In these cases the action deemed an acquittal effectively ended the prosecution with respect to the dismissed charges. While this is most evident in *Martin Linen* and *Fong Foo* it is also true in the unusual facts of *Smalis*, as the trial court's decision to hold the other changes in abeyance pending the appeal of the demurrer demonstrates that the demurrer was final with respect to those dismissed charges.

The trial court's actions in this case show that the initial dismissal of the gun charge was not a final judgment that warrants double jeopardy protection. The decision to correct

the legal error underlying the initial dismissal is no different than a court granting a motion to reconsider and reversing its initial ruling. Double Jeopardy should not prevent a court from reconsidering a ruling, so long as the initial ruling is not yet final.

Appellate procedure helps demonstrate this principle. This Court and the federal circuit courts have the jurisdiction to reconsider their rulings upon a timely motion for rehearing. See Supreme Court Rule 44; Fed. Rule App. Proc. 40. When an appellate or habeas court rules that the evidence was constitutionally insufficient to convict, see *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979), double jeopardy precludes retrial. See *Burks* v. *United States*, 437 U. S. 1, 18 (1978). While such rulings preclude retrial, double jeopardy does not prevent this Court or a federal circuit court from reversing an initial ruling of insufficient evidence to convict after a timely motion to rehear. Similarly, a federal circuit court's finding of insufficient evidence does not preclude review of that decision by this Court. When this Court overruled a federal circuit court for improperly granting habeas under *Jackson*, see *Wright* v. *West*, 505 U. S. 277, 295-297 (1992) (plurality opinion), double jeopardy was not even mentioned. While an acquittal is constitutionally significant under double jeopardy, it is only significant when it is final. The trial court in this case should be similarly unconstrained by double jeopardy to reconsider its initial incorrect decision on the sufficiency of the evidence.

The trial court's actions in this case indicate that it did not consider its initial action to be final. It is true that how a court labels its action is irrelevant to the double jeopardy analysis. See *Martin Linen*, 430 U. S., at 571. However, whether the trial court treated its first decision as final is relevant to whether that decision was in fact final. The initial dismissal was not final under Massachusetts procedure, since a Massachusetts judge has the power to reconsider the decision while the case is pending. See *Commonwealth* v. *Smith*, 788 N. E. 2d 977, 983 (Mass. App. Ct. 2003). As the dismissal of the weapons charge

was reversed before the case was submitted to the jury, this decision was not final for the purpose of double jeopardy. Nor is this an attempt to manipulate procedural rules in order to avoid the Double Jeopardy Clause. For example, a state ruling declaring that acquittals are not final until reviewed by an appellate court would violate double jeopardy. Allowing a court to review its own ruling is a traditional practice that does not violate the Clause.

The fact that this initial ruling would be considered an acquittal, had it not been reconsidered by the same court, is thus irrelevant to the double jeopardy analysis. The term "acquittal" "has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U. S. 377, 392 (1975).

> "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. [Citations.] Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a *resolution*, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U. S., at 571 (emphasis added).

Just as a judge can reconsider a dismissal of a charge, a jury can reconsider an acquittal until the verdict is final. The Federal Rules of Criminal Procedure allow the jury to be polled after a verdict is returned. See Fed. Rule Crim. Proc. 31(d). This procedure is not limited to guilty verdicts. "After a *verdict* is returned but before the jury is discharged, the court must on a *party's* request, or may on its own, poll the jurors individually." *Ibid.* (emphasis added). If the jury is polled after an acquittal is announced and a juror disagrees with the not guilty verdict, double jeopardy does not bar retrial because the acquittal was not final. See *United States* v. *Love*, 597 F. 2d 81, 85-86 (CA6 1979); *United States* v. *Anzalone*, 886 F. 2d 229, 230-231 (CA9 1989); *State* v. *Bell*, 322 N. W. 2d 93, 95-96 (Iowa 1982). No order or verdict is recognized under double jeopardy until it is final. Since the trial court's initial order was not final, the decision to reinstate the weapons charge did not violate double jeopardy.

The defendant's arguments do not address this central issue. His assertion that *United States* v. *Jenkins*, 420 U. S. 358 (1975) and *Swisher* v. *Brady*, 438 U. S. 204 (1978) prevent supplemental findings after a "true acquittal," see Pet. Brief 25, ignores finality. In *Jenkins*, the acquittal was the clearly final order of the District Court discharging the defendant after a bench trial, see 420 U. S., at 359. *Swisher* supports the state's position in this case. In *Swisher*, the special master's hearing and the reconsideration by the judge were a single proceeding which did not violate double jeopardy, 438 U. S., at 215-216, just as the consideration and reconsideration of a motion by the judge in this case did not.

Other assertions by the defendant are similarly irrelevant in the context of this case. He claims that once a judge or jury "truly acquits" the defendant, further government attempts to convict the defendant are forbidden no matter what form they take. See Pet. Brief 31. He cites *United States* v. *Jenkins*, *Smalis* v. *Pennsylvania*, 476 U. S. 140 (1986); *Burks* v. *United States*, 437 U. S. 1 (1978), and *Sanabria* v. *United States*, 437 U. S. 54 (1978) for this point. See Pet. Brief 31. Like *Jenkins*, *Smalis*, *Sanabria*, and *Burks* all involve unquestionably final acquittals. See *Smalis*, *supra*, at 141-142 (appeal, dismissal of prosecution on the ground that the evidence is legally insufficient to support prosecution done at the end of a bench trial); *Sanabria*, *supra*, at 56, 62 (appeal of midtrial exclusion of evidence and subsequent acquittal); *Burks*, *supra*, at 2 (attempted to retry after appellate reversal for insufficient evidence to convict). These cases involve attempts to get another court to reopen a final order acquitting the defendant, which makes them inapplicable to this case.

Similarly, *Burks* cannot support the defendant's remarkable assertion that double jeopardy bars the trial court's power to rehear a case. See Pet. Brief 32. *Burks*' holding that double jeopardy prevents a retrial after an appellate acquittal is not relevant to this point. The defendant's other support for his claim that there is "no constitutional, statutory, or common law

power to rehear an acquittal," Pet. Brief 32, citing *United States* v. *Sanges*, 144 U. S. 310, 315 (1892), is no better. *Sanges* addressed whether there was appellate jurisdiction over a government appeal of an order quashing an indictment. See *id.*, at 310-311. That case was decided before Congress generally authorized government appeals in criminal cases, and this Court held that there was no jurisdiction to hear an appeal in a criminal case. See *id.*, at 323. The passage cited by the defendant is a long quotation from *State* v. *Jones*, 7 Ga. 422, 424, 425 (1849); see *Sanges*, *supra*, at 315. Its denial of a right to rehearing is made in the context of final orders. "If the effect of the judgment is a discharge, then there can be no rehearing, *either by a new trial or writ of error*." *Sanges*, *supra*, at 315 (emphasis added) (internal quotation marks omitted). Even this relic from the prehistory of government appeals in criminal cases cannot support the defendant.

Nor can the defendant claim that he was prejudiced by this ruling. The Massachusetts appellate court held that the defendant was given the option to reopen the defense after the gun charge was reinstated, but declined the offer. See *Smith*, 788 N. E. 2d, at 983. The defendant asserts that the transcript conclusively demonstrates that Smith "was *not* 'provided the opportunity to reopen' in the wake of the judge's reconsideration" of the dismissal of the gun charge. See Pet. Brief 34 (emphasis in original). Since the trial court denied the prosecution's motion to reopen after its initial dismissal of the weapons charge, see J. A. 21-22, the defendant claims that he had no chance to reopen the case after the trial court reinstated the charge. See Pet. Brief 34. This assertion overlooks the fact that Smith never asked the trial court to reopen his case. In his two efforts to get the trial court to reverse its decision reinstating the weapons charge, he never asked to reopen the case, and did not indicate that his defense to this charge had been compromised. After the trial court reinstated the charges, defense counsel wished to argue other reasons for dismissal contained in his motion to dismiss, see J. A. 75-76, and the trial court responded by denying the motion to dismiss. See *id.*, at

76. There was no request to reopen the case. The defense's subsequent request for the trial court to reconsider argued that the prosecution had not, as a matter of law, carried its burden of proving the weapons charge, but did not ask to reopen the defense or indicate that it was prejudiced by the reinstatement of the charge. See *id.*, at 81-82. Any claim of prejudice was waived by trial counsel.

The trial court's first order did not resolve the case in the defendant's favor because it was not final. This trial court's actions did not threaten either the defendant's interest in finality or in avoiding retrial. Since there is no clear threat to either interest, the extraordinary remedy of the Double Jeopardy Clause should not be applied to immunize the defendant from a charge of which he is clearly guilty.

CONCLUSION

The decision of the Appeals Court of Massachusetts should be affirmed.

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Respectfully submitted,

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